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UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF PENNSYLVANIA

DARRYL L. JONES

PETITIONER

V.

FRANK D. GILLIS

RESPONDENT

: CIVIL No. 1:00-CV-2183

:

: (JUDGE RAMBO) ✓

:

:

: (MAGISTRATE JUDGE SMYSER)

FILED
HARRISBURG, PA

APR 08 2003

MARY E. D'ANDREA, CLERK
Per

**OBJECTION TO MAGISTRATE'S REPORT AND RECOMMENDATION
FOR DISMISSAL OF PETITIONER'S WRIT OF HABEAS CORPUS
RELIEF UNDER 28 U.S.C.A. § 2254.**

NOW COMES, the petitioner, Darryl L. Jones, and pursuant to Fed. R.Civ.P. 72(b), 28 U.S.C.A. § 636(b)(1), and respectfully submits the following objections to the Magistrate's Report and Recommendation on the petitioner's Writ of habeas corpus petition, that attacks the judgment, for relief under 28 U.S.C.A. § 2254.

OBJECTION:

1. THE PRESENT MOTION IS NOT PROCEDURALLY BARRED.

The petitioner objects to the Magistrate Judge's Report and Recommendation, Dated March 10, 2003, that petitioner is procedurally barred in this instant habeas corpus motion that attacks the judgment of his conviction. Petitioner was and is entitled to an direct appeal under the Pennsylvania Constitution, Article V, Section 9, and has a United States Constitutional right to effective assistance of counsel on direct appeal, as is protect under the Unites States

Constitution, 6th Amendment, also see, Evitts v. Lucey, 469 U.S. 387, 396, 103 S.Ct. 830, 83 L.Ed.2d 821 (1985). Petitioner also claims that he was denied effective assistance of counsel under 42 Pa. R.Crim.P., Rule 120, and pursuant to recent decision handed down by the Pennsylvania Superior in Comm. v. Librizzi, 810 A.2d 692, which clearly stated the following:

"We remind and admonish all counsel, both privately retained and court appointed, that, once an appearance is entered, the attorney is responsible to diligently and competently represent the client until his or her appearance is withdrawn. Rules of Professional Conduct 1.1 and 1.3. This responsibility includes filing an appeal when client so requests. Counsel is also reminded that an appearance may be withdrawn only by leave of court. Pa.R.Crim.P. 120."

As this Honorable Court can clearly see that counsel never filed an Petition for Allowance of Appeal as requested to do so by petitioner and causing petitioner to file a Motion for Leave to file a Petition for Allowance of Appeal Nunc Pro Tunc, which was denied. The Pennsylvania Supreme Court has long interpret the rule of effective assistance of counsel to include a Petition for Allowance of Appeal. See, Comm. v. Daniels, 491 Pa. 289, 420 A.2d 1323 (1980), also see Comm. v. Hickox, 433 Pa. 114, 249 A.2d 777 (1969).

Because of counsel's failure to file a Petition for Allowance of Appeal as requested for by petitioner and also did not follow the procedures set forth in Anders v. California, 87 S.Ct. 1396 (1967), on how to withdraw from petitioner's case to allow petitioner an opportunity to file a timely petition. This action by counsel cause petitioner to file a Motion for Leave to file an Petition for Allowance of Appeal Nunc Pro Tunc which was denied. However when the petitioner learned that he would be without the assistance of counsel on appeal and that counsel abrupt abandonment jeopardized adherence to procedural constraints, petitioner availed himself of the sole corrective process by filing for allowance of appeal nunc pro tunc, which the Supreme court denied. This action

by counsel has prejudiced petitioner, which in turn prompted the Pa. Supreme Court to deem petitioner's subsequent petition as untimely.

2. THE MAGISTRATE JUDGE FAILED TO ADDRESS THE FACT THAT PETITIONER'S DUE PROCESS RIGHTS WERE VIOLATED WHEN HE WAS DENIED ASSISTANCE OF COUNSEL ON DIRECT APPEAL.

Your petitioner never waived his right to counsel nor did he invoke his right to self-representation, Faretta v, California, 422 U.S. 806, 835, 95 S.Ct. 2525, (1975). Nevertheless, counsel was permitted to withdraw as counsel without follow the proper procedures or filing a Notice to withdraw with the courts, as per 42 Pa.R.Crim.P., Rule 120 (C):

Rule 120 (C), Counsel for a defendant may not withdraw his or her appearance except by leave of court. Such leave shall be granted only upon motion made and served on the attorney for the Commonwealth and the client, unless the interests of justice otherwise require.

Appellate counsel was never appointed and this cause petitioner to proceed pro se, which than cause the 30 filing period to expire. The Supreme Court's decision to deny petitioner's petition nunc pro tunc in which petitioner was unrepresented by counsel, is being view by Magistrate Judge Smyser as an obstacle to a review of the substantive issues in this motion. If the petitioner had received counsel to which he was entitled on direct appeal, it is submitted that a very different outcome and opinion would have been rendered, or in the minimum the Pa. Supreme Court would have had the opportunity to resolve the issues now before this Honorable Court.

3. Exhaustion of available state remedies in this instant case means the first opportunity to present claims of ineffective assistance of counsel of trial counsel as counsel's failure to protect petitioner's rights is now being

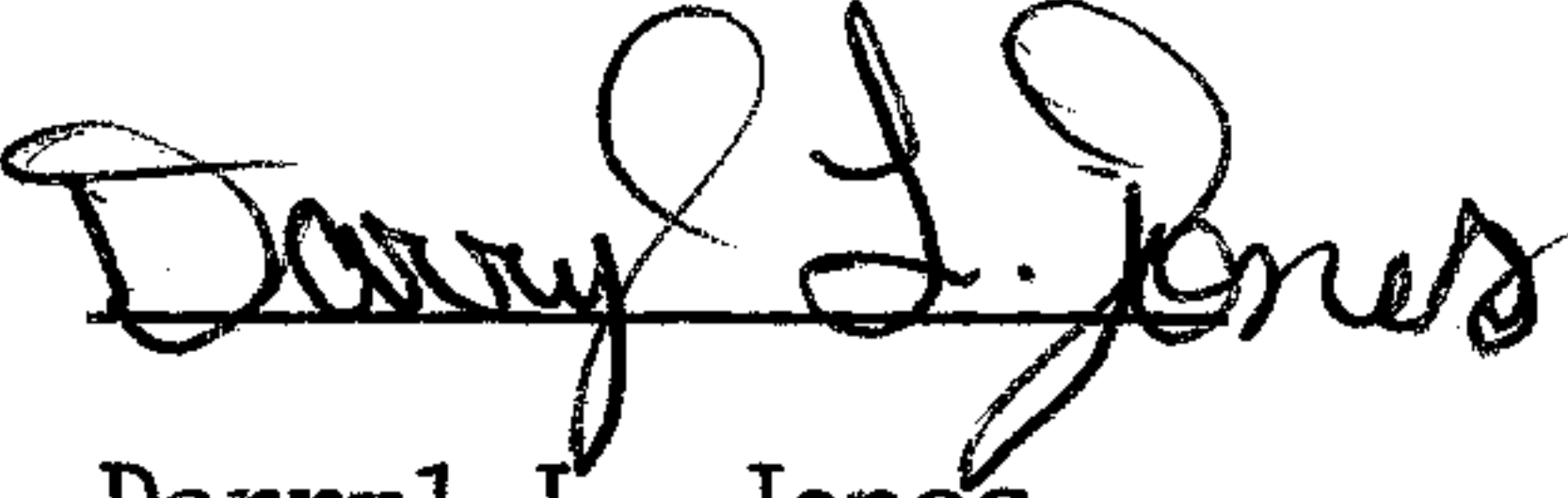
contested at this first opportunity, Parrish v. Fulcomer, 150 F.3d 326, 328(3rd Cir. 1998). The Court in Parrish held that because petitioner's contention involved the legal component of an ineffective assistance of counsel claim, the court exercised plenary review.

But for counsel's actions, petitioner would not be substantially prejudiced and his right to appeal and right to counsel on appeal would not have been at issue before this Honorable court.

CONCLUSION

Based on the objections set forth herein, as well as the arguments and authorities presented in petitioner's prior filings with this Court, the petitioner respectfully requests that this Honorable Court reject the Magistrate's Report and Recommendation, and grant petitioner an evidentiary hearing on this motion, (if this Court deems one necessary), and grant the Petitioner's Motion for Habeas Corpus relief under Section 2254. In the alternative, this Court is urged to remand the matter to the Magistrate Judge to make further findings.

Respectfully Submitted

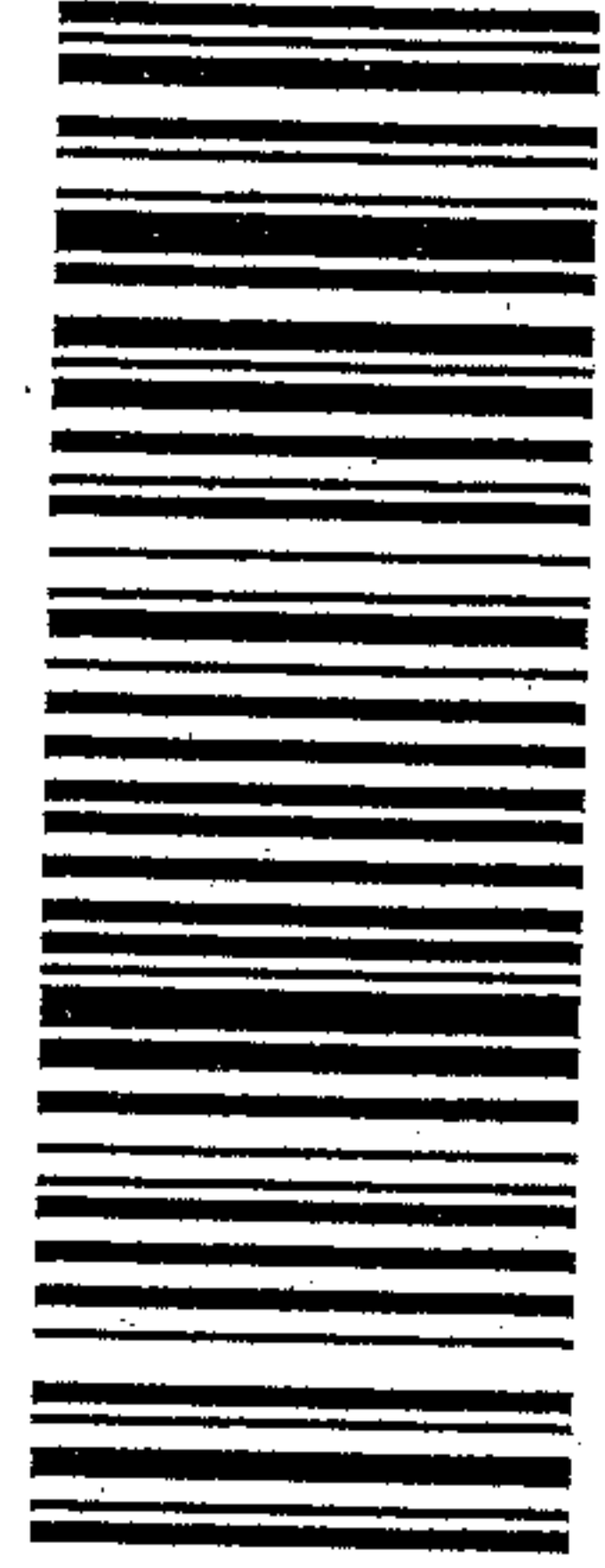

Darryl L. Jones

Dated: 04-05-03

DAREYL L. JONES

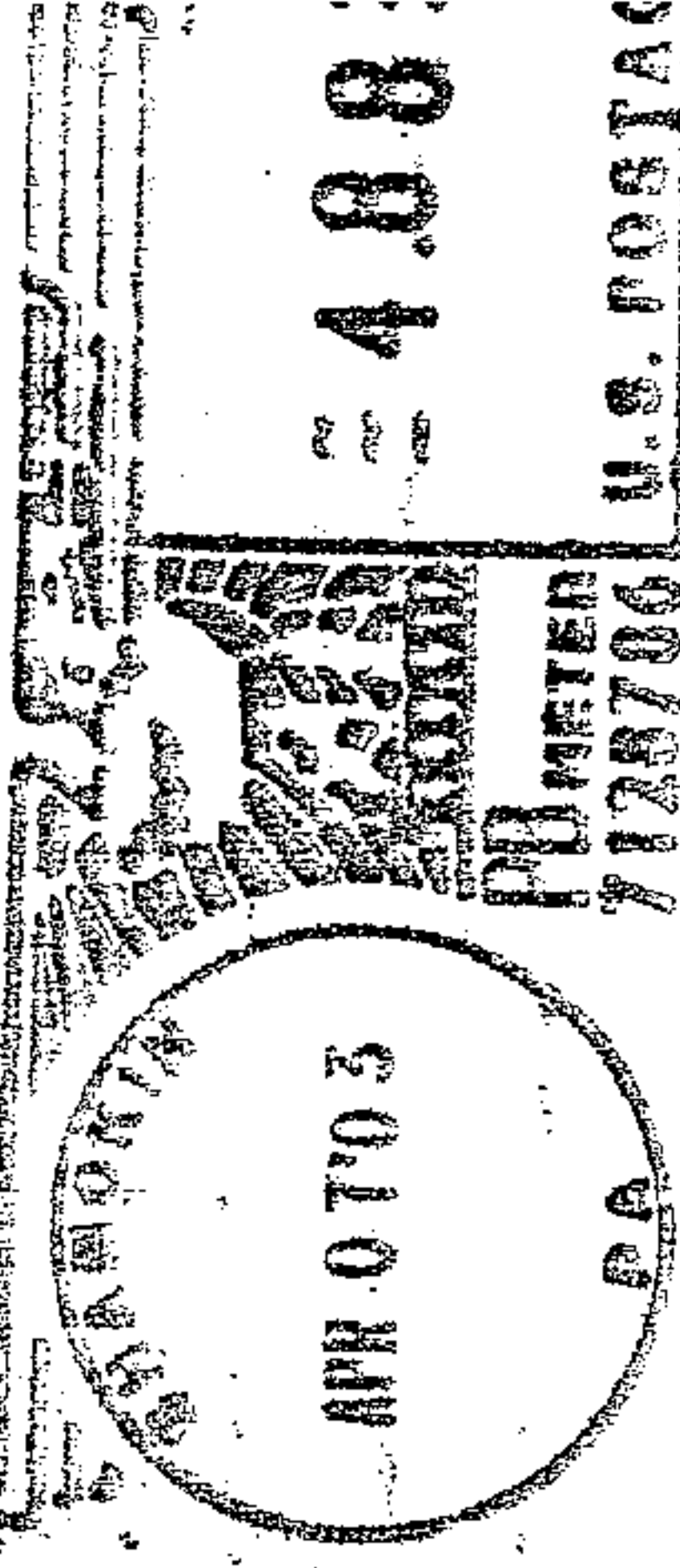
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Middle District of PA



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